No. 10-543

IN THE

Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION L.L.C.,

Petitioner,

v.

BLOOMBERG L.P. and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PROCEDURAL POSTURE AND COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

On May 20, 2008, Bloomberg L.P. ("Bloomberg") submitted a Freedom of Information Act ("FOIA") request to the Board of Governors of the Federal Reserve System (the "Board") seeking documents concerning certain lending activities by Federal Reserve Banks ("FRBs" and, together with the Board, the "Fed"). On November 7, 2008, after having received no formal response from the Board despite repeated requests for one, Bloomberg commenced an action in the United States District Court for the Southern District of New York, seeking an order compelling the Board to produce the requested documents. On August 24, 2009, the District Court entered an order requiring the Board to disclose its responsive documents. Following entry of that order, The Clearing House Association L.L.C. (the "Clearing House") intervened in the action and, with the Board, appealed the District Court's judgment. On March 19, 2010, the Second Circuit affirmed that judgment. By order dated August 27, 2010, the Second Circuit denied the Clearing House's petitions for panel and *en banc* rehearing. The Second Circuit stayed its order pending the filing of a petition for writ of certiorari. The Clearing House filed its petition on October 26, 2010.

The questions raised by the Clearing House's petition are:

1. Whether the parties' dispute has effectively been mooted by Congress's enactment of the Dodd-Frank Wall Street Reform and Consumer

Protection Act, pursuant to which much of the information in question has now been disclosed, and which has set specific rules regarding the disclosure of future Fed lending?

2. Whether the Second Circuit correctly applied well-established law to the particular facts of this case in holding that FOIA's Exemption 4, which applies only to information "obtained from a [non-agency] person," does not apply to the agency records in question because the information they contain was not "obtained from a person" but instead is information generated by a federal agency regarding governmental action?

3. Whether the Second Circuit correctly held that Exemption 4 does not include a so-called "program effectiveness" test, consistent with the text of FOIA (which contains no such provision) and Supreme Court precedent (which held that Exemption 5 of FOIA should not be read to encompass a "program effectiveness" test)?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Bloomberg, the owner and operator of Bloomberg News, is a limited partnership organized under the laws of the State of Delaware. Bloomberg's partnership interests are held by Bloomberg, Inc. and BLP Acquisition L.P., neither of which is a publicly-held entity. No publicly-held entity owns any of Bloomberg's partnership interests.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Bloomberg L.P. ("Bloomberg") respectfully submits this brief in opposition to the petition of The Clearing House Association L.L.C. (the "Clearing House") for a writ of certiorari to review the March 19, 2010 unanimous judgment of the United States Court of Appeals for the Second Circuit.

PRELIMINARY STATEMENT

The petition marks the continuation of an almost three-year campaign – commenced by the Board and assumed by the Clearing House – to nullify the Board's disclosure obligations under the Freedom of Information Act and cloak in secrecy the Fed's unprecedented and highly controversial use of public money to prop up financial institutions during

the 2008 financial crisis. The Clearing House has consistently based that campaign on the assertion that disclosure would cause competitive harm to the borrowers by "stigmatizing" them. But that assertion is legally insufficient, factually unsupported, and disproven by the response to the recent, Congressionally-mandated disclosure of much of the information in question.

That disclosure, which the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act compelled the Board to make, did not produce any of the calamities that the Clearing House maintained would inevitably result from Fed transparency. It has therefore not only disproven the central premise of the Clearing House's petition, but has also effectively mooted much of the parties' dispute, as the Clearing House concedes. (Petition at 3 n.2.)[1]

Indeed, the Clearing House's arguments about the need for guidance from the Court are directed less at the instant dispute, and more at imagined, future FOIA requests to other agencies. Of course, the Court's role is to decide live cases and controversies between the litigants before it, not to issue advisory opinions to help guide other agencies' handling of speculative and imaginary future FOIA requests. And no such guidance is needed with respect to requests for records of future Fed lending under the programs at issue here, because the Dodd-Frank Act, which mandates disclosure of such records on specific schedules, has answered that question, too.

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[1] All citations to "Petition" are to the Clearing House's petition for a writ of certiorari, dated October 26, 2010.

The fact that Dodd-Frank mandates future disclosures regarding the Fed's emergency lending programs also belies the Clearing House's claim that the Second Circuit's decision, if not reversed, will diminish the effectiveness of those programs. That argument is based on the notion that future borrowers, no matter how dire their straits, will not avail themselves of Fed assistance for fear of being stigmatized if the fact of their borrowing became public, thereby diminishing the Fed's ability to affect monetary policy. But to the extent future borrowers will make decisions based on publicity concerns rather than liquidity needs, they will look to the clear and dispositive disclosure rules contained in the Dodd-Frank Act, not the outcome of this litigation. Perhaps in recognition of that, the Solicitor General – who represents the governmental interests that the Clearing House invokes – declined the Board's request for permission to seek certiorari (Petition at 19-20) and has not supported the Clearing House's petition.

The Board and the Clearing House succeeded in delaying disclosure of the requested information for over two years, notwithstanding the unambiguous rulings of the District Court and Court of Appeals, and capitulated only when Congress intervened. They continue to block disclosure of the remaining information, even 34 months after the lending activities in question took place. That delay flies in the face of FOIA's command that non-exempt documents be disclosed to taxpayers in a timely fashion, and has severely undermined the public confidence in government that FOIA's broad disclosure requirements were designed to engender. Bloomberg respectfully submits that disclosure of the

agency records in question has been delayed long enough, and that the Clearing House cannot show any "compelling reasons" for further delay. Accordingly, Bloomberg respectfully requests that the Clearing House's petition be denied.

COUNTERSTATEMENT OF THE CASE

A. The Fed's Mandate and the Loan Programs at Issue.

The Board oversees the government's central banking system, and its objectives include "to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates"; to address "unusual exigent circumstances" in the domestic economy; and to relieve liquidity strains through lending. (Board Appeal Br. at 4-5, 32-33.)

The Board accomplishes these objectives in large part through loan programs administered by the various FRBs, including the lending facilities ("Lending Facilities") at issue here. Those facilities include the Discount Window ("DW"), the Term Auction Facility ("TAF"), the Primary Dealer Credit Facility ("PDCF") and the Term Securities Lending Facility ("TSLF"). Through these Lending Facilities, the Fed lends taxpayers' money to certain private institutions for short periods of time, ranging from overnight to 90 days. (JA-265-298.)[2]

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[2] All citations to "JA" are to the Joint Appendix submitted before the Second Circuit.

During 2008, according to the Fed's public reports, the institutions eligible to participate in the Lending Facilities included Banc of America Securities LLC, Barclays Capital Inc., Goldman, Sachs & Co., HSBC Securities (USA) Inc., J.P. Morgan Securities Inc., Merrill Lynch Government Securities Inc., Morgan Stanley & Co. Inc., Bear, Stearns & Co., and Lehman Brothers Inc. (JA-313.) During the week of August 9, 2007, before the Fed expanded its loan programs during the economic crisis, the Fed had an average outstanding loan balance through the discount window of approximately $1 million. (JA-350.) During the week of October 8, 2008, after changes to the Fed's loan programs, the Fed had an average outstanding loan balance of over $400 billion. (JA-270-77.)

The Board creates records called "Remaining Term Reports" to summarize FRB lending activities through the Lending Facilities. (JA-38-39, at ¶ 11.) For each loan, the Remaining Term Reports contain the name of the borrower institution, the type of institution, the originating FRB, the type of credit extended, the origination and maturity dates of the loans, the individual loan amounts, the total credit outstanding, and the total credit maturing on a specific date. (JA-57.) The Board creates those records based on data it receives from the FRBs. (*Id.*)

B. Bloomberg's FOIA Request and the Board's Withholding of Responsive Remaining Term Reports.

On May 20, 2008, Bloomberg submitted to the Board a request (the "Request") under the Freedom

of Information Act ("FOIA"), 5 U.S.C. § 552, seeking information concerning the Lending Facilities. (JA-14-15.) Not until December 9, 2008 – almost seven months after Bloomberg submitted the Request (and after Bloomberg filed suit) – did the Board formally respond to it. In its response, the Board informed Bloomberg that it had located 231 responsive Remaining Term Reports, but claimed that they were exempt from disclosure under FOIA's Exemption 4 (which allows an agency to withhold confidential commercial information obtained from a non-agency "person") and Exemption 5 (which covers certain materials sent within or between agencies). (JA-60-64.)

C. The Proceedings Below

1. Bloomberg Sues for Disclosure, and the Parties Move Directly to Summary Judgment.

On November 7, 2008 (prior to receiving the Board's belated response to its FOIA request), Bloomberg sued the Board, seeking to compel disclosure of responsive records. (JA-2, Docket Sheet Entry #1; JA-9-22.) On March 4, 2009, the Board moved for summary judgment on a number of grounds. (JA-3-4, Docket Sheet Entries #9-17.) Bloomberg opposed the Board's motion and filed its own motion for summary judgment seeking immediate disclosure of the requested records. (JA-4, Docket Sheet Entries #18-24.) The Board opposed Bloomberg's motion but did not claim the need for any discovery.

2. The District Court Rules That the Remaining Term Reports Are Not Exempt From Disclosure.

On August 24, 2009, the District Court granted Bloomberg's summary judgment motion. *Bloomberg L.P. v. Bd. of Governors*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009). Among other things, the District Court concluded that the Board failed to meet its burden of proving that the Remaining Term Reports were covered by Exemption 4. In reaching that conclusion, the District Court found that the Board did not "point to an immediate risk of competitive harm that will result from disclosure of the Remaining Term Reports." *Id.* at 280. The District Court explained that "[c]onjecture, without evidence of imminent harm, simply fails to meet the Board's burden of showing Exemption 4 applies." *Id.* The District Court also declined to join those courts that expanded Exemption 4 to include a so-called "program effectiveness" test, which would allow an agency to withhold documents if it thought disclosure would diminish the effectiveness of its programs. *Id.* at 278 n.15. Finally, the District Court held that Exemption 4 did not apply because most of the information in the Remaining Term Reports was not obtained from a non-governmental "person." *Id.* at 278. The District Court ordered the Board to produce the Remaining Term Reports within five business days. *Id.* at 282. It then stayed its order to give the Board time to file a notice of appeal. (JA-6, Docket Sheet Entry #33.)

On September 17, 2009, two weeks after judgment was entered, the District Court granted the Clearing House leave to intervene. (JA-513.)

3. The Second Circuit Affirms the District Court's Judgment.

The Board and the Clearing House appealed the District Court's judgment to the Second Circuit. (JA-521-522.) On appeal they maintained that Exemption 4 covers the requested material, but abandoned any argument under Exemption 5. On March 19, 2010, the Second Circuit issued a unanimous decision affirming the judgment of the District Court. *Bloomberg L.P. v. Bd. of Governors*, 601 F.3d 143 (2d Cir. 2010). Applying well-settled case law, the Second Circuit held that the information in the Remaining Term Reports – including the identity of the borrowing banks, the dollar amount of the loans, the loan origination and maturity dates, and the collateral securing the loans – was not "obtained from" the borrowing banks within the meaning of Exemption 4 because that information was generated by the Board and reflects governmental action. *Id.* at 148-49. The Second Circuit also held that disclosure of the requested materials would not cause the FRBs – from whom the Board obtained the information – to suffer the kind of competitive harm contemplated by the "privileged or confidential" requirement of Exemption 4. *Id.* at 149-51. In so holding, the Second Circuit expressly rejected the Board and the Clearing House's request that it extend the reach of Exemption 4 beyond its plain terms to encompass the so-called "program effectiveness" test. *Id.* at 150-51.

On May 3, 2010, the Board and the Clearing House filed petitions for panel and *en banc* rehearing. On August 20, 2010, the Second Circuit denied those petitions. The Board and the Clearing

House then moved to stay the Second Circuit's mandate. By orders dated August 27, 2010, the Second Circuit stayed its mandate for 60 days.

On October 26, 2010, the Clearing House filed its petition for a writ of certiorari. The Board did not file a certiorari petition. The Clearing House's petition revealed that on October 22, 2010, the Board informed the Clearing House that the Solicitor General had denied the Board's request to file a certiorari petition. (Petition at 19-20.)

By letter dated November 9, 2010, the Solicitor General requested, pursuant to Supreme Court Rule 30.4, a one month extension of the thirty-day period (*see* SUP. CT. R. 15) to file the government's response to the petition. The Solicitor General followed that request with two additional ones. Those requests reveal the Solicitor General's decision not to support the Clearing House's petition. *See* SUP. CT. R. 12.6 (stating that a respondent who *supports* a petition is allowed to file a response to the petition setting forth its support, but must do so within twenty days after the case is placed on the Court's docket, a period of time which "will not be extended").

Thus, the Clearing House seeks certiorari without the government's support.

D. The Board Discloses Much of the Information in Question Pursuant to the Dodd-Frank Act.

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act"), Pub. L. No. 111-203, 124 Stat. 1376

(2010). The Dodd-Frank Act addressed the issues in this case in two important ways: it mandated the disclosure of much (but not all) of the information Bloomberg sought in its FOIA request, and it established specific requirements for the disclosure of the Board's post-Act lending activities.

In particular, Section 1109 of the Dodd-Frank Act required the Board to disclose, by December 1, 2010, for all parties that received assistance under the TAF, the TSLF, and the PDCF (among other emergency lending facilities): (1) the identity of the borrower; (2) the type of assistance provided; (3) the value of the assistance; (4) the date on which the assistance was provided; and (5) the terms of repayment, including interest and collateral. Dodd-Frank Act § 1109(c). That is precisely the information that Bloomberg requested in its FOIA request with respect to those programs.

Consistent with the requirements of the Dodd-Frank Act, on December 1, 2010, the Board published detailed reports listing, with respect to the TAF, TSLF, and PDCF programs, the name of each borrower, the amount borrowed, the terms of the transaction, and the type of collateral posted. As was widely reported by several major news organizations, the spreadsheets showed that the loans were received by many prominent financial institutions whose interests are being represented here by the Clearing House. As the Clearing House concedes, any appeal with respect to information relating to those three emergency lending programs is therefore moot. (*See* Petition at 3 n.2.) And, contrary to the speculation at the heart of the Board's petition, the

disclosure of this information had no apparent adverse effect on any borrower.[3]

The Dodd-Frank Act also mandates disclosure of the Fed's future lending activities, including DW lending. With respect to DW lending, on the last day of the eighth calendar quarter following the quarter in which the transaction was conducted (*i.e.*, two years after the transaction is conducted), the Board must disclose: (1) the name and identifying details of each borrower; (2) the amount borrowed; (3) the interest rate or discount paid; and (4) information identifying the types and amounts of collateral. *See* Dodd-Frank Act § 1103(b); 12 U.S.C. § 248(s) (as amended). The same information must be disclosed with respect to lending through emergency facilities one year after the Board terminates such a facility. *Id.* The Chairman of the Board is authorized to disclose such information earlier upon a determination "that such disclosure would be in the public interest and would not harm the effectiveness of the relevant credit facility or the purpose or conduct of covered transactions." *Id.*

These rules reflect the Congress's policy determination regarding the proper balance between the impact that immediate disclosure might have on the effectiveness of the various Lending Facilities,

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[3] The stock price of many of the borrowing banks *increased* significantly on December 1, as the Dow Jones Industrial Average rose more than 2.25 percent on that day alone. John Spence, *Bank Stocks Join in Market Rally*, MarketWatch (Dec. 1, 2010, 5:37 PM), http://www.marketwatch.com/story/data-lift-banks-as-europe-debt-fears-recede-2010-12-01.

and the public's right to know how its money is being spent. In particular, it reflects the Congress's definitive conclusion that, with the passage of two years' time, the public interest in disclosure outweighs any competing interest in secrecy.

REASONS FOR DENYING THE PETITION

There is no "compelling reason" for the Court's intervention here. Indeed, there are at least four compelling reasons for the Court to *deny* the Clearing House's petition: *First*, the disputed issues here have been largely mooted by Congressional action. *Second*, in affirming the District Court, the Second Circuit followed well-established FOIA law in declining to apply Exemption 4 here – it did not, as the Clearing House asserts, create a new exception to that exemption. *Third*, the Second Circuit's rejection of a so-called "program effectiveness" test does not warrant review, despite the supposed "split" with the First and D.C. Circuits on that point, where (a) this Court has already considered and rejected any such exemption in an analogous context, (b) the Executive Branch – whose interests are ostensibly protected by the "program effectiveness" exemption – has not asked the Court to review the matter, (c) it is up to the Congress, not the courts, to adopt such an exemption, (d) the Congress has now spoken with respect to the information requested by Bloomberg, and (e) the "split" among the Circuits is not ripe for the Court's review. *Fourth*, further delays would be inconsistent with FOIA's command that non-exempt documents be disclosed promptly.

I. THE UNDERLYING DISPUTE IS EFFECTIVELY MOOT.

As an initial matter, the Court should deny the Clearing House's petition because the dispute over disclosure of the information requested by Bloomberg is effectively moot. As a result of the Congress's enactment of the Dodd-Frank Act, the Board was *required* to – and, in fact, did – disclose most of the information in question on December 1, 2010. Thus, there is no longer a dispute with respect to that information. Moreover, the Dodd-Frank Act supplies the rules for disclosure of similar information on a going-forward basis. Thus, review by this Court will not impact future FOIA requests for the types of information at issue here. Because the dispute over disclosure of the information requested by Bloomberg is now effectively moot, there is no "compelling reason" to review the Second Circuit's decision.[4]

A. Dodd-Frank Has Resulted in Disclosure of Much of the Information in Question.

Bloomberg's FOIA request sought information relating to lending by the Fed pursuant to the DW, the TAF, the TSLF, and the PDCF. In particular, Bloomberg sought the identities of the borrowers, the amounts borrowed, and the collateral posted for

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[4] Dodd-Frank states that the Fed's disclosure obligations mandated by the Act are not meant to affect pending litigation. Dodd-Frank Act § 1103(b); 12 U.S.C. § 248(s)(9). However, that provision does not bolster the Clearing House's argument here. Indeed, the Clearing House's argument in support of the petition is focused on hypothetical future FOIA requests.

these Lending Facilities for the period April 4, 2008 through May 20, 2008. The Dodd-Frank Act has now resulted in the disclosure sought by Bloomberg with respect to TAF, TSLF, and PDCF lending (the "Non-DW Lending Facilities").

Section 1109 of Title XI of the Dodd-Frank Act required the Board to disclose by December 1, 2010, the following information concerning the Non-DW Lending Facilities: (1) the identity of the borrower; (2) the type of assistance provided; (3) the value of the assistance; (4) the date on which the assistance was provided; and (5) the terms of repayment including interest and collateral. That is precisely the information that Bloomberg sought in its FOIA request with respect to those programs. (JA-14-15.) On December 1, 2010, the Board complied with Dodd-Frank's mandate and released that information.

Thus, under the Dodd-Frank Act, regardless of whether the Second Circuit correctly affirmed the District Court's decision requiring disclosure of the requested information relating to each of the three Non-DW Lending Facilities, the Board has now published the information that Bloomberg requested about them. As a result, there can no longer be a dispute with respect to that information, as the Clearing House concedes in its petition. (*See* Petition at 3 n.2.)

B. Dodd-Frank Provides Clear Rules Governing Future FOIA Requests For the Type of Information at Issue Here, Including DW Lending Information.

While the Dodd-Frank Act did not compel disclosure of DW lending activities during the specific time period covered by Bloomberg's request, it does establish procedures for the disclosure of that type of information going forward. In particular, under the Dodd-Frank Act, the Board must disclose, with respect to future DW lending: (1) the name and identifying details of each borrower; (2) the amount borrowed; (3) the interest rate or discount paid; and (4) information identifying the types and amount of collateral. That information must be disclosed within two years after the transaction occurs.

Thus, although the specific DW lending information that Bloomberg requested is not implicated by this disclosure obligation, the Dodd-Frank Act has established the ground rules for disclosure of that same type of information regarding post-Act DW lending. Any decision here, therefore, will have limited precedential value, as it will only apply to FOIA requests to the Board for information on DW lending prior to the enactment of the Dodd-Frank Act. And a similar controversy is unlikely to arise regarding post-Act lending, because Congress has set forth clear rules for disclosure.

Because Congress' action and the December 1, 2010 disclosures by the Board have mooted much of the underlying dispute, there is no "compelling

reason" to review the Second Circuit's decision, and the petition should be denied. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them" and cannot provide "an opinion advising what the law would be upon a hypothetical state of facts") (internal quotations and citations omitted); *Padilla v. Hanft*, 547 U.S. 1062, 1062 (2006) (Kennedy, concurring) (petition for certiorari denied where petitioner's claims were "hypothetical and to no effect, at this stage of the proceedings" as a result of an intervening act by the government); *Aikens v. California*, 406 U.S. 813, 814 (1972) (dismissing previously granted writ of certiorari where intervening act of California Supreme Court rendered the issue moot).

II. THE SECOND CIRCUIT APPLIED WELL-SETTLED FOIA LAW IN FINDING THAT THE REQUESTED INFORMATION WAS NOT OBTAINED FROM THE BORROWERS.

The Clearing House invokes only one FOIA exemption here: Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). For purposes of FOIA, "person" is defined as an "individual, partnership, corporation, association, or public or private organization *other than an agency*." 5 U.S.C. § 551(2) (emphasis added). In this case, the Second Circuit correctly held that Exemption 4 does not apply to the Remaining Term Reports because the information in them was not obtained from a

"person," but rather reflects governmental action. As the Second Circuit stated, "[t]he information requested by Bloomberg was generated within a Federal Reserve Bank upon its decision to grant a loan. Like the loan itself, it did not come into existence until a Federal Reserve Bank made the decision to approve the loan request." *Bloomberg*, 601 F.3d at 148.

Contrary to the Clearing House's argument, the Second Circuit did not create a new "executive action" exception to Exemption 4. Rather, the Second Circuit simply applied a properly-stated rule of law regarding "intertwined information" to the facts of this case. Its holding in that regard is entirely consistent with this Court's observation that because Exemption 4 is limited to information "obtained from a person," it does not cover "information generated by the Federal Government itself." *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *see also Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006) ("[M]aterials implicating Exemption 4 are generally not developed within the agency. Instead, it must procure commercial information from third parties, either by requirement or by request."); *Buffalo Evening News, Inc. v. Small Bus. Admin.*, 666 F. Supp. 467, 469 (W.D.N.Y. 1987) (ordering disclosure where a newspaper requested certain details about loans made by the Small Business Administration, rejecting the agency's argument that it "obtains information concerning the status of . . . [the] loan from the small business itself . . . . [and] merely compiles and records the data supplied by the business through its loan payment activity").

The cases cited by the Clearing House do not support a different conclusion. Rather, the information at issue in those cases consisted of compilations of data that were supplied to the government by private parties. *See Can. Commercial Corp. v. Dep't of the Air Force*, 514 F.3d 37 (D.C. Cir. 2008) (companies listed the item prices for goods in proposals and contracts with the government); *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 304 (D.C. Cir. 1999) (aerospace company provided government agency with satellite launch pricing information, including "proposed prices for certain contract line items, including prices for several launch missions and various other launch-related services");[5] *Gen. Elec. Co. v. Dep't of the Air Force*, 648 F. Supp. 2d 95 (D.D.C. 2009) (companies listed the item prices for goods in proposals and contracts with the government);[6] *Pub. Citizen Health Research Grp. v. NIH*, 209 F. Supp. 2d 37 (D.D.C. 2002) (licensee provided government with royalty rates at the outset of negotiations with the government); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F.

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5 The *McDonnell Douglas* court also held that although the line-item pricing figures provided to the agency by the company were protected from disclosure, it was "undisputed that the total price of the contract may be made public." 180 F.3d at 306. Disclosure of the "total contract price" there is identical to disclosure of the total loan amounts reflected in the Remaining Term Reports.

6 Moreover, the Clearing House's reliance on *Canadian Comm'l Corp.* and *General Electric* is misplaced because neither of those decisions discuss the "obtained from a person" requirement, the proposition for which the Clearing House cites them.

Supp. 2d 19 (D.D.C. 2000) (companies provided information in export insurance applications).[7] The reports in those cases are thus qualitatively different from the Remaining Term Reports, which reflect government action by the Fed in the form of details about FRB lending.[8]

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[7] The Clearing House's reliance on *Comstock International (U.S.A.), Inc. v. Export-Import Bank*, 464 F. Supp. 804 (D.D.C. 1979) is also misplaced. The Clearing House incorrectly asserts that, in connection with Exemption 4's "obtained from a person" requirement, the District Court for the District of Columbia concluded that the loan agreement at issue was protected from disclosure "even though 'the information contained in the loan agreement [was] not submitted to the government but rather generated by it through Eximbank's participation in the negotiation process.'" (Petition at 24 (quoting *Comstock*, 464 F. Supp. at 807).) However, that fact was relevant to the court's inquiry into whether there was a sufficient government interest threatened by disclosure, *not* whether the information in the loan agreement was "obtained from a person" within the meaning of Exemption 4. *See Comstock*, 464 F. Supp. at 806.

[8] Although the court in the unreported decision in *Clarke v. United States Department of Treasury*, Civ. A. No. 84-1873, 1986 WL 1234 (E.D. Pa. Jan. 28, 1986), held that the requested information was protected from disclosure by Exemption 4, the court's primary holding focused on the fact that the requested information did not exist in a previously prepared document. In any event, the *Clarke* court did not provide any discussion of the "obtained from a person" requirement, beyond the conclusory sentence that the information at issue there was obtained from a person, presumably because there was not a dispute between the parties concerning that prong of Exemption 4.

The Clearing House's argument amounts to, at most, an assertion that the Second Circuit erred in its factual determination that the information in the Remaining Term Reports did not come from borrowers. That complaint is ill-founded; the Second Circuit properly recognized that, as a factual matter, the borrowers requested loans from the FRBs, and the FRBs processed those loan requests. The FRBs then provided data concerning their lending activities, including the decisions to lend and the terms of the loans, to the Board, which used the information to create the Remaining Term Reports. Thus, the Remaining Term Reports reflect Fed (and, therefore, governmental) action. *Bloomberg*, 601 F.3d at 148. In any event, even if the Clearing House could demonstrate an error in that factual analysis, it does not and cannot demonstrate why any such factual error would warrant review by this Court.

Finally, the Clearing House expresses concern for how the Second Circuit's ruling might impact future FOIA requests to other agencies for other types of information. But this case does not involve any such request or any other agency. The Clearing House's speculation about future unrelated FOIA cases – and the supposed parade of horribles that the Clearing House speculates will occur as a result of the Second Circuit's decision – does not warrant review.

III. THE SECOND CIRCUIT'S REJECTION OF THE SO-CALLED "PROGRAM EFFECTIVENESS" TEST DOES NOT WARRANT REVIEW.

The Clearing House also contends that the Second Circuit's refusal to read a "program effectiveness" test into Exemption 4 has created a conflict with the D.C. and First Circuits that requires review by this Court. Bloomberg respectfully submits that the Second Circuit's rejection of a test that is nowhere to be found in the text of Exemption 4, and which was rejected by the Court in the context of Exemption 5, does not create a "compelling reason" warranting a grant of certiorari. Given that courts are commanded to construe FOIA's exemptions narrowly (*see, e.g., Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)), the creation of new exemptions must come from the Congress. Here, the Congress has spoken on the subject with the Dodd Frank Act, which explicitly balances the public's interest in disclosure with the Board's interest in maintaining the effectiveness of its emergency lending facilities.

The so-called "program effectiveness" test has its genesis in a footnote in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* court cited to Congressional hearings in which "the problems of compliance and program effectiveness are mentioned as governmental interests possibly served by [Exemption 4]." *Id.* at 770 n.17. Subsequent to *National Parks*, the D.C. Circuit and the First Circuit adopted the "program effectiveness" test as a governmental interest that may render information

"confidential" under Exemption 4. *See 9 to 5 Org. for Women Office Workers v. Bd. Of Governors*, 721 F.2d 1, 11 (1st Cir. 1983); *see also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 287 (D.C. Cir. 1987), *overruled on other grounds by Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc).

However, this Court has already rejected a government agency's attempt to read the "program effectiveness" test into FOIA Exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). *See also Merrill*, 443 U.S. at 354. In *Merrill*, the Court considered the Federal Open Market Committee (the "FOMC") of the Federal Reserve System's attempt to withhold "certain monetary policy directives from the public during the month they [were] in effect" because releasing them during that month supposedly "would undermine the effectiveness of the agency's policy." *Id.* at 343, 353.

The Court determined that the FOMC's assertion of the program effectiveness doctrine could not be reconciled with FOIA's fundamental goal of full disclosure. The Court reasoned:

> Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda, even those that contain final opinions and statements of policy, whenever the agency concluded that disclosure would

> not promote the "efficiency" of its operations or otherwise would not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest" standard.

Id. at 354.

As the Second Circuit noted below, that same conflict with FOIA's goals would arise if the "program effectiveness" test was read into Exemption 4. As the Second Circuit held, "[t]he 'program effectiveness' test, if applied as the Board invokes it, would give impermissible deference to the agency, and would be analogous to the 'public interest' standard rejected by the Supreme Court in the context of Exemption Five." *Bloomberg*, 601 F.3d at 150 (citing *Merrill*, 443 U.S. at 354). The Second Circuit continued, "a test that permits an agency to deny disclosure because the agency thinks it best to do so (or convinces a court to think so, by logic or deference) would undermine 'the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA].'" *Id.* at 151 (quoting *Rose*, 425 U.S. at 361) (alteration in the original). Thus, while the Second Circuit's rejection of the program effectiveness test might be at odds with the D.C. and the First Circuit's interpretation of Exemption 4, it is wholly consistent with the underlying reasons for this Court's rejection of that same test in the context of Exemption 5. As a

result, there is no compelling reason to review the Second Circuit's decision.

Moreover, as the Second Circuit correctly noted, the expansion of FOIA's exemptions is the province of the Congress, not the courts:

> The requirement of disclosure under FOIA and its proper limits are matters of congressional policy. The statute as written by Congress sets forth no basis for the exemption the Board asks us to read into it. If the Board believes such an exemption would better serve the national interest, it should ask Congress to amend the statute.

Id. Indeed, subsequent to the Second Circuit's decision, Congress enacted the Dodd-Frank Act to establish specific requirements for disclosure of the specific type of information requested by Bloomberg regarding the Lending Facilities. Simply put, Congress has spoken.

Further, the judicially-created "program effectiveness" prong of Exemption 4 was designed to protect *governmental*, not private, interests. *National Parks*, 498 F.2d at 770 n.17. Here, the government has not sought Supreme Court review, presumably in recognition of the fact that Congress has now spoken on this issue. But whatever the reason, the absence of governmental support for the Clearing House's petition belies the Clearing House's contention that Court intervention is necessary to ensure the continued effectiveness of the Lending Facilities.

In addition, release of the historical information requested by Bloomberg here – which, because of the delay tactics by the Board and the Clearing House is now almost three years old – will have no impact whatsoever on the effectiveness of the Fed's lending programs in the future.[9] Indeed, the Dodd-Frank Act has established clear rules mandating the disclosure of this type of information at specific times. Thus, the Board's disclosure of future lending will be compelled by those rules, and will be wholly unaffected by the ultimate outcome of this case.[10] And to the extent that the question of

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9 The Clearing House's speculation that disclosure of the requested information "threatens to harm the borrowing banks" by allowing the public to "draw inferences" about the banks' "current financial conditions" (Petition at 4) is likewise unfounded. The Board's December 1st disclosures of practically identical information pursuant to the Dodd-Frank Act caused no such harm. None of the borrowing banks implicated in the December 1st disclosures experienced a run by their depositors. And, as noted above, the stock market rose sharply that day.

10 In any event, the information that Bloomberg seeks here is now commercially stale, thus eliminating any potential competitive harm – a requirement of Exemption 4 – that the Clearing House speculates might flow from its release. Indeed, various courts have recognized, in the FOIA context, that the passage of time can eliminate competitive harms that *might* have flowed from more immediate release of sensitive information. *See Merrill*, 443 U.S. at 363 (recognizing that where certain directives requested under FOIA contained sensitive information and "immediate release of these Directives would significantly harm the Government's monetary functions or commercial interests," then a slight delay in the publication of the directives would be appropriate); *Hack v. Dep't of Energy*, 538 F. Supp. 1098, 1104 (D.D.C. 1982)

whether Exemption 4 does in fact encompass a "program effectiveness" test arises in future FOIA cases in other contexts, the issue can be resolved in those cases rather than here, where the dispute is effectively moot.

Finally, until the Second Circuit's decision here, no other Circuit Court besides the D.C. and First Circuits has either adopted or rejected the program effectiveness test in Exemption 4.[11] Because only three Circuit Courts have addressed this issue, it has not had sufficient time to percolate at the Circuit Court level. That is reason enough for the Court to deny the petition.

For all of these reasons, the Second Circuit's rejection of the "program effectiveness" test does not present a "compelling reason" for granting the Clearing House's petition.

(government agency allowed to withhold certain information in response to FOIA request "until the contract for the project has been let"); *Ctr. for Pub. Integrity v. Dep't of Energy*, 191 F. Supp. 2d 187, 195 (D.D.C. 2002) ("Courts have recognized that the passage of time can mitigate the potential for harm that might otherwise have resulted from the release of commercial information."). The impact of the passage of time on potential competitive harm has been taken into account by Congress in its adoption of the Dodd-Frank Act.

[11] In *Nadler v. Federal Deposit Insurance Corp.*, 92 F.3d 93 (2d Cir. 1996), the Second Circuit expressly stated that it did "not reach the issue whether the district court properly afforded relief to the FDIC on the basis of the 'program effectiveness' exemption." *Id.* at 96.

IV. FURTHER DELAY WOULD BE INIMICABLE TO FOIA'S ESSENTIAL COMMAND THAT NON-EXEMPT AGENCY RECORDS BE DISCLOSED WITHOUT UNDUE DELAY.

In enacting FOIA, "Congress sought to open agency action to the light of public scrutiny. Congress did so by requiring agencies to adhere to a general philosophy of full agency disclosure. Congress believed that this philosophy, put into practice, would help ensure an informed citizenry, vital to the functioning of a democratic society." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (internal quotations and citations omitted); *see also* H.R. Rep. No. 89-1497, at 33 (1966) ("a democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies").

FOIA also reflects the Congress's conclusion that greater disclosure will engender greater public confidence in our government: "A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operations. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty." S. Rep. No. 89-813, at 45 (1965).

In short, by allowing the public to know "what the Government is up to," FOIA leads to a better-informed citizenry with greater confidence in its public institutions. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 750 (1989).

FOIA's commands would be rendered hollow if agencies and their private sector allies were allowed serially to invoke procedural devices to delay disclosure. "[U]nreasonable delays in disclosing nonexempt documents violate the intent and purpose of the FOIA, and courts have a duty to prevent these abuses." *Long v. IRS*, 693 F.3d 907, 910 (9th Cir. 1982). The Congress has echoed this when it amended the FOIA in 2007 to try to stem agency unresponsiveness: "Federal agencies have become less and less responsive to requests for information ... [t]axpayers should have the opportunity to obtain information from the Federal Government quickly and easily." 153 Cong. Rec. S15701-04 (Dec. 14, 2007) (statement of Rep. Smith) (*cited by Judicial Watch, Inc. v. Bureau of Land Mgmt.*, 562 F. Supp. 2d 159, 175 (D.D.C. 2009)).

Despite orders from the District Court and the Court of Appeals directing disclosure, it took an Act of Congress to force the Board finally to reveal, 925 days after Bloomberg's request, any of the information encompassed by that request. Apparently recognizing that further litigation is not warranted, the Solicitor General has chosen not to seek this Court's review. Bloomberg respectfully submits that disclosure of the remaining information encompassed by Bloomberg's request has been delayed for far too long, and that this Court ought not to allow the Clearing House's petition to extend that delay even longer.

CONCLUSION

The Clearing House's petition for a writ of certiorari should be denied.

Respectfully submitted,

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